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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

v.

JULIA MARTINEZ, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE SENECA NATION OF INDIANS OF NEW YORK AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ARTHUR LAZARUS, JR.,
Fried, Frank, Harris,
Shriver & Kampelman
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Attorney for Amici Curiae,
The Seneca Nation of Indians and
The Association on American
Indian Affairs, Inc.

Of Counsel:
WILLIAM B. HOFFMAN

December, 1976

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JULIA MARTINEZ, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 42(3), the Seneca Nation of Indians of New York and the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, move the Court for leave to file the attached brief *amici curiae* in support of the Petition for Certiorari in the above-captioned case. The petitioners, Santa Clara Pueblo and its chief executive, have consented to the filing of this brief; the respondents, Julia Martinez, *et al.*, have refused so to consent.

The Seneca Nation is a federally recognized Indian tribe which governs reservations located in the State of New York. Consistent with ancient Seneca custom and tradition, membership in the Nation and inheritance with respect to land descend only through the female line.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*, of protecting the rights of self-government exercised by American Indian tribes. The Association is the largest Indian interest organization in the United States and has a national membership of 50,000 that includes both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and in the filing of *amicus curiae* briefs in *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975), *cert. granted*, No. 75-562 (May 24, 1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968); and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

The Tribe and the Association file this motion because of the far-reaching impact of the decision below on the membership ordinances of virtually every Indian tribe. The Court is respectfully referred to the statement of Interest of *Amici Curiae* appearing at pages 5-7 of the accompanying brief.

Respectfully submitted,

ARTHUR LAZARUS, JR.,
Fried, Frank, Harris,
Shriver & Kampelman
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Attorney for Amici Curiae,
The Seneca Nation of Indians and
The Association on American
Indian Affairs, Inc.

Of Counsel:
WILLIAM B. HOFFMAN

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BRIEF *AMICI CURIAE* OF THE SENECA NATION OF INDIANS OF NEW YORK AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The Seneca Nation is a federally recognized Indian tribe which governs reservations located in the State of New York. The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*, of protecting the rights of self-government exercised by Indian tribes.

This case presents a question of great and continuing concern to the *amici curiae* and to all Indian tribes—whether the Indian Civil Rights Act of 1968 prohibits Indian tribes from maintaining their traditional criteria for tribal membership or from establishing membership standards reflective of tribal cultural values and practices. In the present case, the *amici curiae* are concerned with this broad question in a specific context—namely, whether the equal protection provision of the Indian Civil Rights Act, 25 U.S.C. §1302(8), renders invalid an ordinance adopted by the Santa Clara Pueblo and applied in an evenhanded manner which bars membership to children born of marriages between female members of the pueblo and non-members.[1]

In terms of its potential impact on American Indian tribes, the importance of this question cannot be overstated.[2] *See* COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*,

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[1]The *amici curiae* do agree, however, that once a membership law has been enacted, it must be enforced evenhandedly, and, moreover, that the equal protection provision of the Indian Civil Rights Act can be utilized to stop the discriminatory application of tribal enrollment laws.

[2]Virtually every tribal enrollment ordinance discriminates to the extent of excluding certain persons from membership. The membership laws of most tribes require that one parent be a member, and that the applicant possess a minimum degree of Indian blood (*e.g.*, Shoshone Indian Tribe). The specific blood quantum, however, varies considerably, ranging from one-half (*e.g.*, Havasupai Tribe) to no minimum (*e.g.*, Santa Clara Pueblo). Some tribes specify that an applicant must possess a minimum quantum of the blood of the tribe of a particular reservation—regardless of the applicant's total degree of Indian blood (*e.g.*, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Sioux Tribe of the Standing Rock Reservation, Shoshone Indian Tribe, and Northern Arapahoe Tribe). Others discriminate by imposing residency requirements (*e.g.*, Shoshone-Bannock Indian Tribe). In a number of Indian tribes, membership descends according to the father's

[Footnote continued]

132-37 (1942 ed.). The Court has long recognized that membership in an Indian tribe represents the equivalent of citizenship, and that the right of a tribe to define its standards for citizenship is an indispensable prerequisite to self-preservation and integrity as a socially and culturally unique Indian nation. *See Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Nofire v. United States*, 164 U.S. 657 (1897).

Over the years, as circumstances and times have changed, tribes of their own accord and by democratic process have made changes in the requirements for enrollment. The decision below, however, would impose the external standards of the non-Indian society on the enrollment criteria of the tribes. *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039 (10th Cir. 1976).

STATEMENT OF THE CASE

For purposes of this brief, *amici curiae* adopt the "Statement of the Case" found in the Petition for a Writ of Certiorari at pages 7-10.

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blood line (*e.g.*, Sac and Fox Tribe of Iowa, Northern Arapahoe Tribe, Mohawk Tribe, and San Ildefonso Pueblo), while in others, membership follows the mother's blood (*e.g.*, all New York Iroquois Indian tribes except Mohawk).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW UNLAWFULLY DEPRIVES INDIAN TRIBES OF THEIR SOVEREIGN IMMUNITY FROM SUIT IN CASES INVOLVING THE EXERCISE OF THEIR GOVERNMENTAL POWERS.

The issue presented herein is one of first impression. The Court has never had occasion to determine whether the Indian Civil Rights Act constituted an express waiver of tribal sovereign immunity. The sovereign status of Indian tribes, evidenced by treaty and recognized judicially since the earliest days of the Republic, is beyond question. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Talton v. Mayes,* 163 U.S. 376 (1896); *Toledo v. Pueblo de Jemez,* 119 F. Supp. 429 (D.N.M. 1954). As a concomitant of sovereignty, tribes are immune from suit without an express waiver of immunity by a tribe or by the Congress. *United States v. United States Fidelity Co.,* 309 U.S. 506 (1940); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967); *Maryland Casualty Co. v. Citizens Nat'l Bank,* 361 F.2d 517 (5th Cir. 1966); *Haile v. Saunooke,* 246 F.2d 293 (4th Cir.), *cert. denied sub nom. Haile v. Eastern Band of Cherokee Indians,* 355 U.S. 893 (1957). Indeed the circuit court below has recognized previously that an express congressional authorization is required to permit federal court jurisdiction over a dispute between a tribe and its members. *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113 (10th Cir. 1962); *Native American Church v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959).

The decision of the Tenth Circuit Court of Appeals contravenes a clear line of decisional law establishing the principle that sovereign immunity is not waived by implication, and that an express waiver is required to grant jurisdiction to the courts. *United States v. King,* 395 U.S. 1 (1969).[3]

Both the district and circuit courts below failed to respect the assertion of sovereign immunity by petitioner Santa Clara Pueblo and by its chief executive. 540 F.2d at 1042; 402 F. Supp. at 7-11. In denying petitioners' motions to dismiss for lack of jurisdiction, the courts below found waivers of tribal immunity in the 1968 Indian Civil Rights Act. Yet nowhere is an express waiver of such immunity to be found in the Act. This Court has never ruled that the Act affected tribal sovereign immunity.[4] The *amici curiae* respectfully submit that the Court should grant the petition of the Santa Clara Pueblo to correct the erroneous assertion of jurisdiction below,

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[3]The instant case attacks a governmental act of the sovereign which distinguishes it from modern trends disfavoring immunity in actions arising from the commercial activities of the sovereign. *See Alfred Dunhill of London v. Republic of Cuba,* ___U.S. ___, 44 U.S.L.W. 4665, 4669-70, (U.S. May 24, 1976).

[4]Decisions of the lower courts are in conflict with respect to whether §1302 of the Indian Civil Rights Act is a waiver of immunity. *Compare Wounded Head v. Tribal Council of the Oglala Sioux Tribe,* 507 F.2d 1079 (8th Cir. 1975); *Pinnow v. Shoshone Tribal Council,* 314 F. Supp. 1157 (D. Wyo. 1970), *aff'd on other grounds sub nom. Slattery v. Arapahoe Tribal Council,* 453 F.2d 278 (10th Cir. 1971); *Yellow Bird v. Oglala Sioux Tribe,* 380 F. Supp. 438 (D. S.D. 1974); *Jacobson v. Forest County Potawatomi Community,* 389 F. Supp. 994 (D. Wis. 1974) *with Martinez v. Santa Clara Pueblo, supra; Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926 (10th Cir. 1975); *Brown v. United States,* 486 F.2d 658 (8th Cir. 1973); *Johnson v. Lower Elwha Tribal Community,* 484 F.2d 200 (9th Cir. 1973); *Daly v. United States,* 483 F.2d 700 (8th Cir. 1973).

to resolve the conflict in the circuits and to direct the dismissal of this action against petitioners as a violation of the sovereign immunity which resides in all Indian tribes.

II.

THE CASE PRESENTS AN ISSUE OF GREAT IMPORTANCE TO ALL INDIAN TRIBES.

A. The Decision Below Unjustifiably Restrains Tribal Self-Determination in the Establishment of Membership Criteria.

The circuit court's opinion in this case holds that petitioners' 1939 enrollment ordinance violates the equal protection clause of the Indian Civil Rights Act because the ordinance bases enrollment eligibility of children of mixed marriages upon the sex of the parent who is an enrolled member of the pueblo. 540 F.2d at 1048. In so holding, the court of appeals purported to apply current Fourteenth Amendment equal protection standards to a gender-related classification in the pueblo ordinance, and asserted the absence of a "compelling interest" (540 F.2d at 1047) of the pueblo in maintaining the 1939 enrollment ordinance—a test never accepted by a majority of this Court even in non-Indian cases dealing with gender-related classifications. (*See* note 7 & p. 15 *infra*.)

The opinion of the Tenth Circuit Court of Appeals in this case is the first instance in which Fourteenth Amendment equal protection standards, as distinct from the standard of evenhanded application, have been applied to a tribal ordinance governing a non-Anglo-American institution, here membership in the pueblo. This unprecedented action of the circuit court seriously infringes upon tribal self-determination in the vital area of membership. With the single exception of enrollment for purposes of certain federal programs not here

relevant, Indian tribes historically have exercised unlimited authority in determining standards for membership, subject only to express congressional enactments. *See Cherokee Intermarriage Cases, supra; Roff v. Burney, supra; Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958); *Smith v. Bonifer*, 154 F. 883 (C.C. Ore. 1907); COHEN, *supra*, at 133-37. This aspect of sovereignty, as no other, permits tribes to maintain their cultural identity by defining, through their duly constituted leaders, who shall be members.[5] The Tenth Circuit opinion below,

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[5]The *amici curiae* request the Court to take judicial notice of the changed situation of Indian tribes over the last 150 years. In the Nineteenth Century, tribes were rather immobile and isolated. Hence, intermarriages outside the immediate tribal group were relatively infrequent, and could be handled on an informal, *ad hoc* basis. With the advent of the automobile, however, the contact of tribes with the majority culture and with each other increased dramatically, and therewith the number of intermarriages outside the tribe. Confronted with the possibility that specific tribal cultures would disintegrate if large numbers of outsiders were enrolled as members, tribes such as the Santa Clara Pueblo adopted formal, selective enrollment ordinances.

The Tenth Circuit dismisses the solution achieved by the pueblo as "arbitrary and expedient", "inasmuch as it originates from practical economic considerations", 540 F.2d at 1048, and states:

> The instant tribal policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition.

Id. The *amici curiae* agree that ancient traditions are worthy of great respect. But to limit the scope of tribal self-determination to preservation of old procedures, without permitting Indian solutions to new problems forced upon the tribes, is to take an arbitrarily static view of tribal culture. This view effectively mandates that Indians conform to majoritarian values in responding to changing circumstances within their communities. Such an approach is indefensible and flies in the face of established federal policy toward Indian tribes. S. Con. Res. 26, 92d Cong., 1st Sess., 117 CONG. REC. 46383 (1971).

which allows a non-Indian court, sharing no trace of tribal cultural values, to second-guess Indian leaders in matters of evenhandedly-applied tribal membership criteria, constitutes a debilitating and statutorily unwarranted interference in this process of self-definition. As was recognized by the district court below:

> To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it.

402 F. Supp. at 18-19.

B. The Decision Below Contravenes the Legislative History of, and Precedents Construing, the Equal Protection Clause of the 1968 Indian Civil Rights Act, 25 U.S.C. §1302(8).

The position of the Congress on Indian civil rights legislation, and congressional rejection of bills which would have rendered tribes subject to the full range of restrictions on governmental power contained in the Constitution, is evident from the face of the legislative history of the 1968 Act. *Compare Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 26 (1968) *with Hearings on Constitutional Rights of the American Indian, S. 961-68 & S.J. Res. 40, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557, 617-19, 621-22 (1972); Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 351 (1969); *see generally* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969). The strong position of the Congress in favor of increasing, rather than diminishing, self-determination in all aspects of tribal government is also expressed in a resolution defining federal policy toward Indians adopted subsequent to passage of the 1968 Act. S. Con. Res. 26, 92d Cong., 1st Sess., 117 CONG. REC. 46383 (1971).

The Tenth Circuit's decision below flatly contravenes the congressional intent embodied in the Indian Civil Rights Act and in the 1971 federal policy statement. The cultural integrity which the Congress so carefully worked to preserve will be lost irretrievably if, as the decision below implies, self-determination does not extend to the decision of who is a member of a tribe (and thus who shall be included in determining which cultural traditions shall be preserved or built upon). Nor is this threat to the cultural sovereignty of tribal government in accord with decisional law under the Indian Civil Rights Act in sister circuits or in previous Tenth Circuit decisions.[6]

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[6]The Eighth and Ninth Circuits, for example, have evolved a test which *amici curiae* believe to comport with the legislative intent and history of the Indian Civil Rights Act equal protection clause: If the tribal institution or procedure giving rise to an action is borrowed from Anglo-American governmental tradition, Fourteenth Amendment equal protection precedents apply. *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973) ("one-man, one-vote" principle applied to tribal election district apportionment); *accord, Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976). If, by contrast, an action arises outside the context of traditional Anglo-American jurisprudence, *i.e.*, in a uniquely Indian setting, the applicable equal protection standard under the Indian Civil Rights Act is the non-discriminatory administration of the tribal legislation, or "evenhandedness". *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973) (blood quantum requirements for tribal officeholders upheld); *accord, Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079

The failure of this Court to review the Tenth Circuit decision below will deluge the federal courts with new litigation requiring intimate familiarity with tribal cultures and traditions alien to non-Indian judges. The delicate balancing of intra-tribal interests demanded in resolving enrollment controversies is a process for which non-Indian courts are unqualified, and thus, such balancing in all likelihood will not occur. In addition, an indefensible drain on tribal resources will be entailed if each tribe must convincingly prove the elements of its culture to a federal judge who may be unsympathetic to those cultural traditions, and who is presented by a plaintiff with arguments based upon the Anglo-American legal tradition in which he has been trained.

The *amici curiae* suggest that this is an opportune moment, while the equal protection clause of the Indian Civil Rights Act is still in its infancy, for the Court to implement the Congressional intent behind this statute, and to assure correct and uniform construction of the Act among the circuits, by granting the writ in this case.

(8th Cir. 1975); *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438 (D. S.D. 1973) (Fourteenth Amendment standards held inapplicable in sole previous federal court decision resting on the application of the Indian Civil Rights Act equal protection clause to tribal membership standards). These cases demonstrate a sensitive approach to the serious question of tribal cultural sovereignty and self-determination under the Indian Civil Rights Act. *See*, Burnett, *supra*, 9 HARV. J. LEGIS. at 617-19, 621-22.

III.

THE COURT BELOW APPLIED AN IMPROPER EQUAL PROTECTION STANDARD TO THE 1939 PUEBLO ENROLLMENT ORDINANCE.

Assuming, *arguendo*, the applicability of recently-evolved notions of equal protection, the *amici curiae* urge the Court to reject the imposition of a strict "compelling interest" test in this case.[7] Indeed a majority of the Court has never accepted this test for gender-based discrimination. To the contrary, the Court has consistently applied a rationality test which focuses on the legitimacy of the governmental interest in determining whether gender-based actions violate the equal protection clause of the Constitution. *See Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Reed v. Reed*, 404 U.S. 71 (1971). Surely, no stricter test should now be imposed in the tribal setting without due consideration by the Court.

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[7]It should also be noted that the stringent standard of equal protection relied upon by the Tenth Circuit in holding the 1939 pueblo ordinance invalid is itself hardly a "venerable tradition" of Anglo-American jurisprudence. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065,1076-132 (1969); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33-34 (1972). This modern doctrine, if considered as a part of Anglo-American culture, constitutes a clear break with tradition, and arises in response to specific problems confronting the majority population at a particular time. Courts should be circumspect in assuming the universal applicability of evolving Fourteenth Amendment notions to qualitatively different cultures, facing different problems and proceeding from different historical bases. Such circumspection is absent from the circuit court's decision below.

CONCLUSION

For the foregoing reasons, the *amici curiae* urge the Court to grant the petition for a Writ of certiorari and to consider the important questions of first impression therein presented.

Respectfully submitted,

ARTHUR LAZARUS, JR.,
Fried, Frank, Harris,
Shriver & Kampelman
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Attorney for Amici Curiae,
The Seneca Nation of Indians and
The Association on American
Indian Affairs, Inc.

Of Counsel:
WILLIAM B. HOFFMAN

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